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No. 79-1741

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, HAROLD JACKSON, DARRELL L., HAROLD, HAROLD M. and LUEA SORENSON,
Petitioners,

No. 79-1744

RGP, INC., OTIS PETERSON, and TRAVELERS INSURANCE COMPANY,
Petitioners,

v.

OMAHA INDIAN TRIBE and UNITED STATES OF AMERICA,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR THE OMAHA INDIAN TRIBE IN OPPOSITION TO THE SUPPLEMENTAL BRIEF

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STATUTES:

"25 U.S.C. § 194. Trial of right of property; burden of proof

"In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership." 2

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BACKGROUND

The Court rendered its June 20, 1979 Opinion in the case of *Wilson* v. *Omaha*.[1] It reviewed in detail the background, legislative history objective and applicability of 25 U.S.C. 194.[2] The Court declared 25 U.S.C. 194 applicable to the facts which were before it. However, the Court remanded the case to the United States Court of Appeals for a single, limited issue: Had the trial court correctly applied the laws of Nebraska to the facts of the case? [3]

The Court of Appeals rendered its January 15, 1980 Opinion in compliance with the Court's remand.[4] After an exhaustive review of the laws of the State of Nebraska, the appellate court declared that the trial court had failed properly to apply the laws of that State.

From the last-cited opinion, Petitioners again seek certiorari from the Court. For the second time, Petitioners seek, among other things, to have the Court declare 25 U.S.C. 194 unconstitutional.[5]

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[1] 442 U.S. 653 (1979).

[2] 25 U.S.C. 194.

"Trial of right of property; burden of proof

"In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership." R.S. § 2126. Derivation: Act of June 30, 1834, c. 161, § 22, 4 Stat. 733.

[3] 442 U.S. 653, 679 (1979).

[4] Omaha v. Wilson, 614 F.2d 1153 (CA 8, 1980).

[5] Earlier requests by the Petitioners respecting the constitutionality of 25 U.S.C. 194 are presented at Pet. Wilson,

On June 30, 1980, the Court rendered its Opinion in *United States* v. *Sioux Nation of Indians*, No. 79-639. Thereafter, on July 18, 1980, the Oglala Sioux initiated a quiet title proceeding in the United States District Court for the District of South Dakota, Western Division. The Sioux Tribe asserts title to the Black Hills in that proceeding. Among many others, the Tribe named the United States as one of the defendants. It charges the United States with extensive wrongdoing. The Oglala Tribe asserts that 25 U.S.C. 194 is applicable to its case.

Petitioners have here filed their "Supplemental Brief," to which this brief is in reply. Petitioners assert that the Oglala Sioux proceeding to recover the Black Hills comes within the purview of Rule 22.6 of the Rules of the Supreme Court.[6]

In their "Supplemental Brief," Petitioners, among other things, assert that:

> ". . . whether or not it [25 U.S.C. 194] is constitutional should be settled by this Court at the earliest moment."[7]

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et al., No. 78-160, p. 4, Question 1; Pet. RGP, Inc., et al., No. 78-162, p. 2, Question Presented For Review. Petitioners RGP, Inc., et al., presented a single question: Whether 25 U.S.C. 194, on it face and as construed, constitutes invidious racial discrimination against Petitioners.

[6] Rule 22.6:

> "Any party may file a supplemental brief at any time while a petition for writ of certiorari is pending calling attention to new cases or legislation or other intervening matter not available at the time of the party's last filing. A supplemental brief, restricted to such new matter, may not exceed 10 pages. Forty copies of any such brief, prepared in accordance with Rule 33 and served as prescribed by Rule 28, shall be filed.

[7] Petitioners' Supplemental Brief, Nos. 79-1741 & 79-1744.

It is the view of the Omaha Tribe that the Court implicitly—if not explicitly—upheld the constitutionality of 25 U.S.C. 194 and applied it with specificity to the facts in the case of *Wilson* v. *Omaha.*[8] Petitioners here are, in effect, seeking a rehearing respecting a decision of the Court in *Wilson* v. *Omaha.*

REPLY MADE TO THE "SUPPLEMENTAL BRIEF" FILED BY PETITIONERS IN SUPPORT OF THEIR SECOND EFFORT TO OBTAIN A WRIT OF CERTIORARI IN THESE CASES

FACTS

In their second petition for certiorari, as in the original petition,[9] Petitioners seek to have the Court determine the constitutionality of 25 U.S.C. 194.[10]

Reason for the "Supplemental Brief," as asserted by Petitioners, is that there was filed July 18, 1980, in the United States District Court for the District of South Dakota, Western Division, by the Oglala Sioux an action to quiet title to lands claimed by the Sioux Tribe. There is only remote relationship between these cases and the Oglala Sioux case—both involve Indians and both involve title to lands. In the Black Hills action, the Oglala Sioux Tribe is asserting primarily that the United States wrongfully seized and took possession of the Black Hills. Here, the United States is in no sense involved as a defendant. The Omaha Indian Tribe charged and proved that the Petitioners are squatters and that the Peti-

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[8] 442 U.S. 653 (1979).

[9] Wilson v. Omaha, No. 79-1741; RGP, Inc. v. Omaha, No. 79-1744; Brief for Omaha Indian Tribe in Opposition.

[10] "Supplemental Brief of the Above-Named Petitioners," p. 5.

tioners had the burden of proving their title. Petitioners failed.

A. Petitioners Are "Squatters" On Indian Lands

Petitioners claim title to the 2900 acres of Omaha land here involved. They do not have patents to those lands. They do not deraign title to the lands in question from patentees of the United States.

Petitioners admit title to the land originally was in the Omaha Indian Tribe. They likewise admit long occupancy and possession by the Tribe of the lands in question. Petitioners nevertheless urge that the 2900 acres, title to which is the subject matter or res of *Wilson* v. *Omaha*,[11] were (a) totally and completely washed away by the Missouri River; and (b) totally and completely replaced by accretions to lands allegedly owned by a predecessor "squatter" of Petitioners.

B. Opinions Of The Court Of Appeals

The Court of Appeals for the Eighth Circuit declared that 25 U.S.C. 194 was an appropriate exercise by Congress of its powers in regard to Indian Affairs.[12] The appellate court repeatedly and specifically held that Petitioners had failed to sustain their burden of proving the 2900 acres were totally washed away and completely replaced by accretions to the squatter predecessor in title of the Petitioners.[13]

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[11] 442 U.S. 653 (1979).

[12] See, Nos. 79-1741 & 79-1744, Brief for Omaha Indian Tribe in Opposition.

[13] *Ibid.*

C. Affirmance By The Court Of The Opinion Of The Court Of Appeals As To The Applicability Of 25 U.S.C. 194

It is correctly stated by the Court of Appeals, respecting the Court's Opinion in *Wilson* v. *Omaha*, that:

> "Generally, the Court sustained our holding that 25 U.S.C. § 194 was applicable [to Petitioners here] and placed both the burden [a] of going forward with the evidence and [b] of persuasion upon defendants [Petitioners here]." [14]

The Court upheld, it is believed, the constitutionality of 25 U.S.C. 194 in its *Wilson* v. *Omaha Indian Tribe* decision.[15] On the subject, the Court stated:

> "There seems to be no question here that the area within the Barrett survey . . . was long occupied by the Tribe as part of the reservation set apart for it in consequence of the treaty of 1854." [16]

That proof by the Omaha Indian Tribe of long occupancy of the lands here involved within the Omaha Indian Reservation was, said the Court, sufficient ". . . to bring § 194 into play." [17]

With the Omaha Indian Tribe having made out its prima facie case, the Court said this:

> ". . . we are in agreement with the two courts below that § 194 contemplates the non-Indian shouldering the burden of persuasion as well as the burden of

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[14] Omaha v. Wilson, 614 F.2d 1153, 1155 (CA 8, 1980).

[15] App. to Pet. Wilson, No. 79-1741, p. 16; Wilson v. Omaha, 442 U.S. 653, 668-69 (1979).

[16] *Ibid.*

[17] *Ibid.*

> producing evidence once the tribe has made out its prima facie case of prior title or possession." [18]

It is respectfully submitted that implicitly and, indeed, explicitly, the Court sustained the constitutionality of 25 U.S.C. 194.

APPLICABILITY OF 25 U.S.C. 194 TO "SQUATTERS"

Here, there is involved the issue of whether "squatters" on Indian lands have the burden of proving their title after the Omaha Indian Tribe made out its prima facie case.

It is important here that the Court's interpretation and application of 25 U.S.C. 194, as set forth above, stemmed from its analysis of (a) the legislative history of 25 U.S.C. 194; (b) the explicit language of 25 U.S.C. 194; and (c) the congressional objective of 25 U.S.C. 194. Predicated upon that analysis, the Court made this explicit determination as to the intention of Congress when it enacted the provision in question:

> "It is clear enough that, when enacted, Congress intended the 1822 and 1834 provisions to protect Indians from claims made *by non-Indian squatters on their land.*" [19]

With reference to the exemption of the states from the application of 25 U.S.C. 194, the Court said this:

> "Because of recurring trespass upon and illegal occupancy of Indian territory, a major purpose of these acts as they developed was to protect the rights of Indians to their properties." [20]

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[18] *Ibid.*

[19] *Ibid.*, at p. 665. [Emphasis supplied].

[20] *Ibid.*, at p. 664.

To accomplish the congressional objectives set forth above, the Court said the Acts, which were companion to 25 U.S.C. 194, are as follows:

> "Among other things, non-Indians were prohibited from settling on tribal properties, and the use of force was authorized to remove persons who violated these restrictions." [21]

As part of the Court's analysis of 25 U.S.C. 194—its congressional history and congressional objectives—the Court cited key decisions, all of which sustained the congressional power to enact legislation complementing or paralleling the objectives of 25 U.S.C. 194.[22]

The Court's in-depth review of the background of 25 U.S.C. 194 and its explicit rulings in *Wilson* v. *Omaha* demonstrate that 25 U.S.C. 194 has already withstood the challenges as to its constitutionality.

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[21] *Ibid.* See, 25 U.S.C. 180, "Settling on or surveying lands belonging to Indians by treaty

> "Every person who makes a settlement on any lands belonging, secured, or granted by treaty with the United States to any Indian any of the boundaries by marking trees, or otherwise, is liable to tribe, or surveys or attempts to survey such lands, or to designate a penalty of $1,000. The President may, moreover, take such measures and employ such military force as he may judge necessary to remove any such person from the lands." R.S. § 2118. Derivation: Act of June 30, 1834, c. 161, § 11, 4 Stat. 730.

[22] See, Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667, 669 (1974); Bryan v. Itasca County, 426 U.S. 373, 392 (1976). See, also, Morton v. Mancari, 417 U.S. 535, 547 (1974); Antoine v. Washington, 420 U.S. 194, 199 (1975).

DEFERENCE BY THE COURT TO LEGISLATIVE BRANCH

In the Court's June 30, 1980 decision in *United States* v. *Sioux Nation of Indians*, there were reviewed in detail the concepts of the separation of power under the Constitution—the Judiciary vis-a-vis the Legislative.[23] The Court stated:

> ". . . this Court's precedents, leads us to conclude that neither of the two separation of powers objections described above is presented by this legislation." [24]

Precisely the same deference to the constitutional powers of Congress over Indian affairs has been accorded to the Legislature by the Court in the case of *Wilson* v. *Omaha*. Repeatedly, the Court has declared that it will decide constitutional issues only if strict necessity compels it to do so.[25] Quite obviously, in these cases, the Court found no predicate for declaring 25 U.S.C. 194 unconstitutional. Rather, the Court sustained 25 U.S.C. 194 and effectively applied it.

CONCLUSION

The fact that 25 U.S.C. 194 and the Court's decision in *Wilson* v. *Omaha* are being cited in on-going cases does not warrant the Petitioners raising anew the issue of the constitutionality of that Act. The Omaha Indian Tribe respectfully requests the Court to deny the pend-

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[23] United States v. Sioux Nation of Indians, Slip Opinion, June 30, 1980, p. 19.

[24] *Ibid.*, at p. 23.

[25] See, Nos. 79-1741 & 79-1744, Brief for Omaha Indian Tribe in Opposition, p. 48.

ing petitions for certiorari. It is believed the denial would be in complete conformity with the Court's decision of June 20, 1979, in *Wilson* v. *Omaha Indian Tribe.*

Respectfully submitted,

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August 1980